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Victim's Criminal Complaint and Restorative Justice

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This paper proposes a new approach to conceiving the relationship between victims and criminal justice processes. In the early Meiji Era (1868−1890), the Kokuso (criminal complaint; Strafantrag) functioned similar to complaints processed according to civil procedure. The Kokuso assumed a purely public function. However, the Kokuso can be considered a victim's right to seek an appropriate investigation and obtain information as well as seek an appropriate prosecution. Prosecutors cannot prosecute offenders according to the Shinkoku-zai (offense prosecuted only upon a criminal complaint; Antragsdelikt) without the Kokuso. Therefore, the Kokuso is a victim's right to stop prosecution, and thus stop investigation. Provisions of the Shinkoku-zai (in particular, the special provision for theft committed against relatives and minor crimes of damage to property) have purposes of settlement according to communities and/or parties. Moreover, the provision of the Shufuku (surrender him/herself to a person with the right to make the complaint), which is applied to all Shinkoku-zai, provides an opportunity for a restoration and apology. Considering these purposes, the Shinkoku-zai is considered as having a background in Restorative Justice.

Introduction

This paper reviews changes in the relationship between victims and criminal justice processes from the perspective of the Kokuso (告訴: criminal complaint; Strafantrag) and Shinkoku-zai (親告罪: offense prosecuted only upon a criminal complaint; Antragsdelikt) from the early Meiji Era (1868−1890) to the present. This paper not only introduces each era's legal system but also proposes an important, new approach to interpret the relationship between victims and criminal justice processes.

1. Changes in Functions of the Kokuso from the Early Meiji Era to the Present

The Kokuso had associations with the Ginmi-negai (吟味願: criminal complaint) conducted in the Edo Era[1] and the incidental private action (私訴: Shiso; 付帯私訴 : Futai-shiso) of the Chizai-hō (治罪法: former criminal procedure law)[2] of 1880. Although the Ginmi-negai was a part of criminal procedure, it also functioned as a civil procedure. The Ginmi-negai was

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1 *See* Yoshiro Hiramatsu (平松義郎), *Kinsei Keijisosyōhō no Kenkyū* (近世刑事訴訟法の研究: Study on Criminal Procedure in the Edo Era), 1960, pp. 600ff.; Ryosuke Ishii (石井良助) (ed.), *Meiji Bunka Shi (Dai 2 Kan) Hōsei Hen* (明治文化史 (第二巻) 法制編: Cultural History in the Meiji Era (vol. 2) Legal System), 1954, pp. 268f.

2 Ishii (ed.), *supra* note 1, p. 269.

regarded as a civil lawsuit in 1879[3]. In addition, in 1881, the Ginmi-negai was consolidated with the Kokuso[4], and victims seeking further action had to take the civil lawsuit (私訴 : Shiso) (Articles 110; 4, Chizai-hō) or the complaint to be effective for prosecuting a criminal case (付帯私訴 : Futai-shiso) (Articles 110 I/II; 4, Chizai-hō). Therefore, in the early Meiji Era, the Kokuso functioned similar to complaints in civil procedure[5].

The Kokuso adopted a purely public function. Currently, it is defined as a victim or relative's report of crime victimization and a manifestation of intention that he/she requires prosecution and/or punishment by authorities (see Article 230, the Code of Criminal Procedure = CCP[6])[7]. In addition, on Feb 20, 1999, the Supreme Court stated the following:

> The purpose of criminal investigation and prosecution is not to recover victims' interests and damages but to maintain public interests such as maintaining order of the nation and society. The Kokuso is merely a clue of criminal investigation and just prompts public prosecutors to prosecute the case, so that the benefit of victims or the persons who file a criminal complaint resulting from criminal investigation or prosecution is factual [in other words, reflexive or secondary], [and it is] therefore not a legally protected benefit. Hence, victims or the persons who file a criminal complaint do not have the right to pursue compensation under the State Redress Act (国家賠償法: Kokka-baisyō-hō) by the reason of illegitimacy of the decision not to prosecute by prosecutors or an inappropriate investigation by investigative authorities.

However, according to common belief, the Kokuso is recognized as a victim's right[8]. In addition, under current Japanese criminal policy, which emphasizes victims, the Kokuso can and should be seen as a victim's right to seek an appropriate investigation (適正捜査請求権: Tekisei-sōsa-seikyū-ken) (see Article 242, CCP[9]) and prosecution (適正訴追請求権: Tekisei-

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3 The Meiji 12 Nen Shihou-syō Tasshi Hei Dai 9 Gō (明治十二年 司法省 達 丙第九号: The Official Notice No. 9 of the Ministry of Justice of 1879).

4 The Meiji 14 Nen Shihou-syō Futatsu Kō Dai 1 Gō (明治十四年 司法省 布達 甲第一号: The Ordinance No. 1 of the Ministry of Justice of 1881).

5 Mutsumi Kurosawa (黒澤睦), *A Study on the Crimes Requiring Formal Complaints from the Victims for Prosecution* (告訴権・親告罪に関する研究), Dissertation, 2007a, pp. 38ff.; Mutsumi Kurosawa, Strafantragsrecht und Antragsdelikte in der frühen Meiji-Zeit (2) (明治初期の告訴制度の形成過程: The Formation Process of the Kokuso System in the Early Meiji Era), *The Journal of Economic Studies University of Toyama (The Fudai Keizai Ronshu)*, vol. 53 no. 2, 2007b, pp. 183ff. (Retrieved from http://hdl.handle.net/10110/1822).

6 Article 230, CCP states that "A person who has been injured by an offense may file a complaint." *See* Ministry of Justice, Japan, *Japanese Law Translation*. 〈http://www.japaneselawtranslation.go.jp/〉

7 Mutsumi Kurosawa, Zur Bedeutung des Strafantrags bei den Antragsdelikten (親告罪における告訴の意義: Significance of the Kokuso in the Shinkoku-zai), *Studies in Law*, vol. 15, 2001, p. 2 (Retrieved from http://hdl.handle.net/10291/7859); Kurosawa, *supra* note 5 (2007a), pp. 12f.

8 Shigeki Itō (伊藤栄樹) et al. (eds.), Shin-pan Chūsyaku Keijisosyōhō (Dai 3 Kan) (新版注釈刑事訴訟法（第三巻）: The New Edition of the Commentaries on the Code of Criminal Procedure (vol. 3)), 1996, pp. 313f. [Michio Satō (佐藤道夫)], p. 559 [Shigeki Itō (伊藤栄樹) and Kazuo Kawakami (河上和雄)], and so on. *See also* Mutsumi Kurosawa, Crime Victims and Criminal Justice Process (犯罪被害者と刑事司法過程との関係のあり方), *Japanese Journal of Victimology*, no. 19, 2009, p. 52.

9 Article 242, CCP states that "A judicial police official shall, when they have received a complaint or ac-

sotsui-seikyū-ken) (see Article 260, CCP[10]) and obtain information (情報入手権: Jōhō-nyūshu-ken) (see Article 261, CCP[11])[12].

2. Functions of the Shinkoku-zai and Victims' Right

In case of the Shinkoku-zai, public prosecutors cannot prosecute a case without the Koku-so (see Articles 135, 180 I, 209 II, 229, 232, 244 II, 251, 255, 264, the Penal Code = PC[13]; Article 338 (4), CCP[14]).

The Shinkoku-zai includes many crimes. For example, the Penal Code includes the following:

(1) Article 135
- 133 Unlawful Opening of Letters (信書開封: Shinsyo-kaifū; Verletzung des Briefgeheimnisses)
- 134 Unlawful Disclosure of Confidential Information (秘密漏示: Himitsu-rōji; Verletzung von Privatgeheimnissen)

(2) Article 180 I
- 176 Forcible Indecency (強制わいせつ: Kyōsei-waisetsu; Sexuelle Nötigung)
- 177 Rape (強姦: Gōkan; Vergewaltigung)
- 178 Quasi Forcible Indecency and Quasi Rape (準強制わいせつ: Jun-kyōsei-waisetsu, 準強姦: Jun-gōkan; Sexueller Missbrauch widerstandsunfähiger Personen)

(3) Article 209 II
- 209 I Causing Injury through Negligence (過失傷害: Kashitsu-syōgai; Fahrlässige

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cusation, send the document and articles of evidence regarding the complaint or the accusation to a public prosecutor immediately."

10 Article 260, CCP states that "Where a public prosecutor has instituted prosecution (起訴: Kiso) or made a disposition not to institute prosecution (不起訴: Fu-kiso) regarding a case with respect to which a complaint, accusation, or claim has been filed, the public prosecutor shall notify the person who filed the complaint, accusation, or claim promptly. This shall also apply to cases where a public prosecutor has withdrawn the prosecution (公訴取消し: Kōso-torikeshi) or has sent the case to a public prosecutor of another public prosecutor's office (移送: Isō)."

11 Article 261, CCP states that "Where a public prosecutor has made a disposition not to institute prosecution regarding a case with respect to which a complaint, accusation, or claim has been filed, the public prosecutor shall promptly notify the reason for the disposition (不起訴理由: Fu-kiso-riyū) upon the request of the person who filed the complaint, accusation, or claim."

12 Mutsumi Kurosawa, Zur historischen Entwicklung und der gegenwärtigen Bedeutung des Strafantragsrechts (告訴権の歴史的発展と現代的意義: Historical Development and Contemporary Significance of the Right to the Kokuso), *Studies in Law*, vol. 18, 2003, p. 11 (Retrieved from http://hdl.handle.net/10291/7862); Kurosawa, *supra* note 5 (2007a), pp. 168f.; Kurosawa, *supra* note 8, pp. 52ff.

13 For example, Article 135, PC states that "The crimes prescribed under this Chapter shall be prosecuted only upon complaint."

14 Article 338, CCP states that "The court shall, by a judgment, render a dismissal of prosecution (Kōso-kikyaku-hanketsu (公訴棄却判決)) when
(1)–(3) [omitted]
(4) The procedure of the institution of prosecution is ineffective because of violation of the provisions."

Körperverletzung)
(4) Article 229 (cf. Article 227 I/III)
224 Kidnapping of Minors (未成年者略取・誘拐: Miseinensya-ryakusyu/yūkai; Entziehung Minderjähriger)
225 Kidnapping for Indecency or Marriage (わいせつ・結婚目的の略取・誘拐: Waisetsu/Kekkon-mokuteki-no-ryakusyu/yūkai; Menschenraub zwecks Unzucht/Vermählung)
(5) Article 232
230 Defamation (名誉毀損: Meiyo-kison; Üble Nachrede oder Verleumdung)
231 Insults (侮辱: Bujoku; Beleidigung)
(6−1) Article 244 II (Committed against Relatives; Haus- und Familiendiebstahl)
235 Theft (窃盗: Settō; Diebstahl)
235−2 Taking Unlawful Possession of Real Estate (不動産侵奪: Fudōsan-shindatsu; Entzug von unbeweglichen Haben)
(6−2) Articles 251; 244 II (Committed against Relatives)
246 Fraud (詐欺: Sagi; Betrug)
246−2 Computer Fraud (電子計算機使用詐欺: Denshikeisanki-shiyō-sagi; Computerbetrug)
247 Breach of Trust (背任: Hainin; Untreue)
248 Quasi Fraud (準詐欺: Jun-sagi; Quasi-Betrug)
249 Extortion (恐喝: Kyōkatsu; Erpressung)
(6−3) Articles 255; 244 II (Committed against Relatives)
252 Embezzlement (横領: Ōryō; Unterschlagung)
253 Embezzlement in the Pursuit of Social Activities (業務上横領: Gyōmujō-ōryō; Unterschlagung im Geschäftsverkehr)
254 Embezzlement of Lost Property (遺失物等横領: Ishitsubutsu-tō-ōryō; Fundunterschlagung)
(7) Article 264
259 Damaging Documents for Private Use (私用文書等毀棄: Shiyō-bunsyo-tō-kiki; Privaturkundenbeschädigung)
260 Damage to Property (器物損壊等: Kibutsu-sonkai-tō; Sachbeschädigung)
263 Concealment of Letters (信書隠匿: Shinsyo-intoku; Unterdrückung von Postsendungen)

The Shinkoku-zai existed in the early Meiji Era[15]. However, a uniformed purpose of system was not considered; even now, multiple purposes are given[16]. For example, first, it is to

15 The first Sinkoku-zai is the "Fu-so no Hōyō wo Kaku" Jō (「父祖之奉養ヲ欠」条: not to support ancestors) of the Kari Kei Ritsu (仮刑律: former temporary penal code) of 1868. *See* Mutsumi Kurosawa, Strafantragsrecht und Antragsdelikte in der frühen Meiji-Zeit (明治初期の告訴権・親告罪: The Kokuso and the Shinkoku-zai in the Early Meiji Era), *The Journal of Economic Studies University of Toyama (The Fudai Keizai Ronshu)*, vol. 52 no. 2, 2006, pp. 297ff. (Retrieved from http://hdl.handle.net/10110/1884).

16 Morikazu Taguchi (田口守一), Shinkoku-zai no Kokuso to Kokka-sotsui-syugi (親告罪の告訴と国家訴追主義: The Kokuso in the Shinkoku-zai and the principle of prosecution by public prosecutors), in: *Mi-*

prevent expanding damage by prosecution or trial in cases of sexual offenses (名誉・秘密の保護: Meiyo/Himitsu no Hogo; Schutz der Privatsphäre) (Article 180 I, PC). Second, punishment is not necessary if the victim does not wish to seek it in cases of minor crimes of damage to property (犯罪の軽微性: Hanzai no Keibisei; Bagatellcharakter) (Article 264, PC). Third, family relationships are respected in cases of the special provision for theft committed against relatives (親族間の犯罪の特例: Shinzoku-kan no Hanzai no Tokurei; 親族相盗例: Shinzoku-sōtō-rei; Haus- und Familiendiebstahl) (Article 244 II, PC)[17].

According to the current Japanese criminal justice system, which originated from the principle of prosecution by public prosecutors (国家訴追主義: Kokka-sotsui-syugi; Offizialprinzip) (see Article 247, CCP[18]), the Kokuso is a victim's right to stop prosecution. Moreover, considering secondary damages by investigative authorities, it should be considered a victim's right to stop investigation[19].

3. Purposes of the Shinkoku-zai and Restorative Justice

On the other hand, provisions of the Shinkoku-zai (in particular, the special provision for theft committed against relatives (Article 244 II, PC) and minor crimes of damage to property (Article 264, PC)) have purposes of settlement according to communities and/or parties. In addition, in Germany, it is noted that a purpose of the Shinkoku-zai is settlement (Versöhnungsgedanke[20] (宥和・和解思想: Yūwa/Wakai-shisō))[21].

Moreover, the provision of the Shufuku (首服: surrender him/herself to a person with the right to make the complaint) (Article 42 II, PC[22]), which is applied to all Shinkoku-zai provides an opportunity for a restoration and apology[23].

Considering these purposes, the Shinkoku-zai is considered as having a background in Restorative Justice[24].

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yazawa Kōichi Sensei Koki-syukuga Ronbun-syu (Dai 1 Kan) Hanzai-higaisya-ron no Shin-dōkō (宮澤浩一先生古稀祝賀論文集 (第一巻) 犯罪被害者論の新動向), 2000, p. 256, p. 258.

17 Kōya Matsuo (松尾浩也), *Keijisosyōhō* (刑事訴訟法: Criminal Procedure), 2nd ed., 1999, p. 41; Kageaki Mitsudō (光藤景皎), *Keijisosyōhō I* (刑事訴訟法 I: Criminal Procedure I), 2007, p. 358. Cf. Susanne Brähmer, *Wesen und Funktion des Strafantrags* (Nature and Function of the Kokuso), 1994, pp. 89ff., pp. 148ff. *See also* Kurosawa, *supra* note 7, pp. 6ff.; Kurosawa, *supra* note 5 (2007a), pp. 102ff.

18 Article 247, CCP states that "Prosecution shall be instituted by a public prosecutor."

19 Mutsumi Kurosawa, Kritische Bemerkung über die Antragsfrist (告訴期間制度の批判的検討: Critical Examination of the Term of the Kokuso in the Shinkoku-zai), *Studies in Law*, vol. 17, 2002, pp. 10ff. (Retrieved from http://hdl.handle.net/10291/7861); Kurosawa, *supra* note 5 (2007a), pp. 171ff.; Kurosawa, supra note 8, pp. 57f.

20 *See* Manfred Maiwald, Die Beteiligung des Verletzten am Strafverfahren (Victim Participation in Criminal Procedure), *Das Goltdammer's Archiv für Strafrecht* 1970, pp. 33ff., pp. 36ff.

21 Kurosawa, *supra* note 7, pp. 10f.; Mutsumi Kurosawa, Die Antragsdelikte als die Wiedergutmachungsjustiz (Restorative Justice) ? (修復的司法としての親告罪?: The Sinkoku-zai as Restorative Justice?), *Studies in Law*, vol. 16, 2002, pp. 11f. (Retrieved from http://hdl.handle.net/10291/7860); Kurosawa, *supra* note 5 (2007a), pp. 110f., p. 118, pp. 128f.

22 Article 42 II, PC states that "With respect to a crime to be prosecuted only upon complaint, the same shall apply to a person who surrendered him/herself to a person with the right to make the complaint."

23 Kurosawa, *supra* note 21, pp. 13f.; Kurosawa, *supra* note 5 (2007a), pp. 131f.

24 Kurosawa, *supra* note 21, pp. 11ff., pp. 15f.; Kurosawa, *supra* note 5 (2007a), pp. 128ff., pp. 133f.

In addition, the Kokuso may be withdrawn at any time before the institution of prosecution (告訴取消し: Kokuso-torikeshi; Zurücknahme des Strafantrags) (Article 237, CCP[25]). In case of the Shinkoku-zai, prosecutors cannot prosecute the case without the Kokuso. Therefore, offenders make reparations to enable the withdrawal of the Kokuso and avoid prosecution[26]. The decision to make reparations may not be voluntary. However, it is established that the Kokuso-torikeshi system makes it easy for victims to receive reparations[27].

Conclusion

The Kokuso can be considered a victim's right to seek an appropriate investigation and obtain information as well as seek an appropriate prosecution. The Kokuso can and should be considered a victim's right to stop prosecution and investigation in the Shinkoku-zai. The Shinkoku-zai has purposes of settlement according to communities and/or parties. The Shufuku provides an opportunity for a restoration and apology. Considering these purposes, the Shinkoku-zai system has a background in Restorative Justice.

Moreover, the Shinkoku-zai system, which enables the person holding a right to pursue the Kokuso to select settlement (not by criminal trial), has similarities to the Restorative Justice approach that aims at a solution by involved parties, not through government sanctions. In addition, the Shinkoku-zai could provide criteria to abolish the powers given to the government to prosecute and impose punishment, which are identified as issues in Restorative Justice[28].

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25 Article 237 I, CCP states that "A complaint may be withdrawn at any time before the institution of prosecution."

26 *See* Peter Rieß, Die Rechtsstellung des Verletzten im Strafverfahren (Legal Standing of Victim in Criminal Procedure), in: *Verhandlungen des 55. Deutschen Juristentages in Hamburg 1984, Gutachaten C*, p. 19. *See also* Günther Zechmann, *Setzt die Nebenklagebefugnis einen Strafantrag voraus?* (Is the Kokuso Essential to Participate in Public Prosecution?), 1996, p. 114.

27 Kurosawa, *supra* note 21, pp. 11f.; Kurosawa, *supra* note 5 (2007a), pp. 129f.

28 Kurosawa, *supra* note 21, p. 7; Kurosawa, *supra* note 5 (2007a), p. 101, p. 133.